United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit

75-4122

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4122

MARCO NIKPRELEVIC,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
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ISSUE PRESENTED

WHETHER THE ORDER OF THE BOARD OF IMMIGRATION APPEALS, AFFIRMING THE IMMIGRATION JUDGE'S DENIAL OF NIKPRELEVIC'S APPLICATION FOR WITHHOLDING OF DEPORTATION, WAS ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act") 8 U.S.C. §1105a, Marco Nikprelevic petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on May 28, 1975. That order dismissed an appeal from a decision of an Immigration Judge denying Nikprelevic's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h). Petitioner contends that the Board's order should be reversed because the denial of his application for withholding of deportation is in violation of the Due Process and Double Jeopardy Clauses of the Constitution of the United States.

STATEMENT OF FACTS

The petitioner is a forty-five year old alien, a native and citizen of Yugoslavia, who was admitted to the United States on March 13, 1971 as a non-immigrant visitor for pleasure.

On October 21, 1971, upon his plea of guilty to manslaughter in the second degree, Nikprelevic was convicted and sentenced by the Supreme Court of the State of New York.

On December 12, 1972 the Immigration and Naturalization Service commenced deportation proceedings with the issuance of an order to show cause and notice of hearing charging that he was deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2). Prior to his deportation hearing Nikprelevic applied to the Service's District Director for political asylum. On October 11, 1973 the alien was interviewed with respect to this application. In accordance with established procedures, see 8 C.F.R. §108, the Service's

District Director requested an advisory opinion from the Department of State, Office of Refugee and Migration Affairs (T. 13). On June 24, 1974 the Department of State responded finding that there was no reason to believe that the petitioner should be exempt from regular immigration procedures on the ground that he would suffer persecution on account of race, religion, nationality, political opinion or membership in a particular social group (T. 12). The District Director denied the petitioner's request for asylum, and proceeded with the deportation proceedings (T. 11).

At his deportation hearing on November 14, 1974 the petitioner, by his counsel, conceded his deportability as charged in the order to show cause (T. 8, p. 2). During the proceeding the alien again applied for withholding of deportation pursuant to Section 243(h) of the Act. Nikprelevic contended that he would be persecuted in Yugoslavia on the basis of his political opinion, his religion, his ethnic background, and his killing of a Yugoslavian citizen while in the United States. In

response to this application the Service's trial attorney introduced into evidence the District Director's request for an advisory opinion, the Department of State's recommendation, and Nikprelevic's record of conviction in New York State (T. 10). During the hearing the petitioner was also questioned by his attorney in order to elicit testimony which might support his claim of anticipated persecution. The alien also made an application for the discretionary privilege of voluntary departure pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e).

The Immigration Judge rendered his decision at the close of the deportation hearing denying the alien's application for withholding of deportation pursuant to Section 243(h) of the Act, finding that he had failed to sustain his burden of establishing that he would be subject to persecution within the meaning of Section 243(h) (T. 7). The Immigration Judge also denied Nikprelevic's application for voluntary departure on the basis that the confinement resulting from his 1971 conviction for manslaughter rendered him ineligible for that privilege. See §§244(e), 101(f)

of the Act. On November 21, 1974 the petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T. 6). On May 28, 1975 the Board dismissed that appeal (T. 3). This petition was filed on June 23, 1975. Since the filing of this action the alien has enjoyed the automatic statutory stay of deportation which accompanies the filing of a petition pursuant to Section 106 of the Act, 8 U.S.C. §1105a.

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253 -

* * * * *

> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

RELEVANT REGULATION

Title 8, Code of Federal Regulations (C.F.R. §242.17)
242.17 Ancillary matters, applications

* * * * *

> (c. Temporary withholding of deportation.* * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETIONARY AUTHORITY IN DENYING PETITIONER'S APPLICATION FOR TEMPORARY WITHHOLDING OF DEPORTATION

A. General Background

Section 243(h) of the Act, 8 U.S.C. §1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* Muscardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution

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*The Attorney General has delegated his autority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). See also Hyppolite v. Immigration and Naturalization Service, 382 F.2d 98 (7th Cir. 1967); Lena v. Immigration and Naturalization Service, 379 F.2d 536 (7th Cir. 1967)

In examining thebroad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. Muscardin v. Immigration and Naturalization Service, supra; Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for

that of the Attorney General. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), aff'd., 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the alien's application for withholding of deportation. Li Cheung v. Esperdy, 377 F.2d 819 (2d Cir. 1967); Kladis v. Immigration and Naturalization Service, 343 F.2d 515 (7th Cir. 1965).

B. The evidence before the Attorney General failed to establish a clear probability of persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason and upon evidence obtained at the deportation hearing. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established law or policies; nor did it rest upon an impermissible

basis such as an invidious discrimination against a particular group. The Immigration Judge followed the well-established rule that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

Under 8 C.F.R. §242.17 (c) the petitioner has the burden of establishing that he would be subject to persecution. MacCaud v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974). He must set forth the conditions relating to him personally which support his anticipation of persecution. Fu v. Immigration and Naturalization Service, supra. This Nikprelevic was unable to do. His evidence, consisting of bare conclusory statements without factual support which might demonstrate the reasonableness of his belief that he will be persecuted, is insufficient. Khalil v. District Director, 457 F.2d 1276 (9th Cir. 1972); Gena v. Immigration and Naturalization Service, 424 F.2d 227 (5th Cir. 1970). The basis of

Nikprelevic's claim is threefold. He claims that he will be subject to persecution on the grounds of his ethnic background, his religion, and his political opinions.

It is respectfully submitted that with respect to Nikprelevic's contentions the Immigration Judge quite properly found that the petitioner had failed to sustain his burden of proof under Section 243(h). See 242.17(c). During his deportation proceeding Nikprelevic alleged that Yugoslavians of Albanian descent are discriminated in educational and employment opportunities. He further testified that he came from a very religious family, and that Yugoslavians who attend church are subject to discrimination in employment. On the other hand, the petitioner testified that he came from a very well-known family and was able to attend military school. He finished high school and his brother obtained a college education in Yugoslavia. Further, Nikprelevic has been continuously employed by an insurance company during the fifteen years prior to his entry into the United States as a visitor for pleasure. His wife works in the same

insurance company where he was employed. In addition, his brother is a television newscaster in Yugoslavia, and his sister is also employed by that television station. Like Nikprelevic, his sister was also financially capable of traveling to the United States as a tourist.

With regard to the alien's claim of anticipated persecution on the basis of his political opinions, Nikprelevic makes the bare assertion that his incarceration during his military service was the result of a statement he made in support of the United States. Nonetheless, Nikprelevic resided in Yugoslavia until 1971 during which time he was employed, raised a family, and was never subsequently arrested or bothered by the Yugoslavian Government. Further, he was able to obtain official travel documents and depart from Yugoslavia despite the alleged public anti-communist statements he supposedly made in 1952 and 1970. Finally, Nikprelevic did not testify as to any membership in a political group that would cause him to anticipate persecution upon his return to his

wife and children in Yugoslavia.*

Finally, the petitioner testified that an oppressive climate in Yugoslavia precludes its general public from speaking out against that government. Clearly, this is not the meaning of persecution under Section 243(h) of the Act. As the Board of Immigration Appeals held in Matter of Surzycki, 13 I. & N. Dec. 261 (1969):

> "There is no indication that the Congress enacted Section 243(h) of the Act with a view of guaranteeing an alien freedom of speech in the country of his nativity, and

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*In his brief to the Board (T. 4) the petitioner submitted a newsclipping which he categorized as "the most important piece of evidence" in support of his application for Section 243(h) relief. This article appears to relate to the trial of four Yugoslavians who allegedly advocated the secession of the Serbian Province of Kosovo, and its incorporation into Albania. Nowhere in the record of these proceedings does it appear that Nikprelevic was a member or advocate of a similar secessionist group or that the Government of Yugoslavia ever persecuted him for such political beliefs. Although Nikprelevic may be opposed to the present government in Yugoslavia, a fact that has not clearly been established on this record, and may quite understandably prefer life in the United States, the statute demands a determination based upon the probability of persecution of the petitioner himself and not of others. Kovac v. Immigration and Naturalization Service, 407 F.2d 102 (9th Cir. 1969).

> if he is not afforded this by his government, then it could be considered that he was being persecuted. We do not interpret Section 243(h) as covering this situation. There are many totalitarian governments in the world today which do not brook dissent of any nature. We do not hold that an alien who feels compelled to espouse in his native country beliefs which are looked upon with disfavor by his government is thereby being persecuted if the government acts against him." Id. at 262.

It is submitted that on the basis of the evidence submitted by the petitioner he has not met the burden of proving that he would be singled out as an individual and persecuted upon his return to Yugoslavia and accordingly there is no abuse of discretion in denying him withholding of deportation on these grounds.

C. Punishment for a traditional crime is not persecution within the meaning of Section 243(h) of the Act.

The petitioner also claims that he will be subject to persecution if he is deported to Yugoslavia because he will again be imprisoned by reason of his having been convicted of manslaughter while in the United States. As the Department of State advised the Service's

District Director, there is no evidence that Nikprelevic would be imprisoned on the same charge upon his return to Yugoslavia (T. 12).

Nonetheless, while the Act does not precisely define the type of persecution which would make an alien eligible for withholding of deportation, the courts have consistently held that punishment for a traditional, non-political crime does not constitute persecution within the meaning of Section 243(h) of the Act. MacCaud v. Immigration and Naturalization Service, supra; Kovacs v. Immigration and Naturalization Service, supra; Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963); Kalatjis v. Rosenberg, 305 F.2d 249 (9th Cir. 1962); Blajiac v. Flagg, 304 F.2d 623 (7th Cir. 1962); Wang v. Pilliad, 285 F.2d 517 (7th Cir. 1960).

Nikprelevic has not submitted one scintilla of evidence that the Government of Yugoslavia intends to imprison him for the crime he committed in this country, nor does he claim that such an alleged governmental action would be based upon his political opinions, race or

religious views. Under the statute, punishment for a crime is not construed to be persecution unless it is established that the prosecution would in fact be for political offenses. Sheng v. Immigration and Naturalization Service, 400 F.2d 678 (9th Cir. 1968); Soric v. Immigration and Naturalization Service, 346 F.2d 360 (7th Cir. 1965), vacated and remanded, 382 U.S. 285 (1966). In the Soric case the alien had been convicted in absentia for dealing in foreign commerce and currency in Yugoslavia. The court held that the Attorney General did not abuse his discretion in finding that the alien had failed to establish that his conviction was a pretext upon which to persecute him for his political and religious views. The court noted that there was no evidence of possible persecution other than the testimony of the alien himself.

In Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963), this Circuit held that the threat and fear of a long imprisonment resulting from an escape from a dictatorial regime might and could constitute persecution within the meaning of Section 243(h). However, in that same case this Circuit unequivocally stated:

"We have no doubt that an alien fugitive from punishment for a traditional crime could not ordinarily claim the benefits of Section 243(h)." Id at 28.

Similarly, in MacCaud, supra, at 359, this Court stated that the prospect of imprisonment for nonpolitical crimes in the country of deportation does not warrant a stay of deportation under Section 243(h) of the Act.*

D. The admission of the Department of State's advisory opinion into evidence at the deportation hearing did not violate Nikprelevic's right to due process of law.

The petitioner contends that the Department of State's "denial" of his request for political asylum violates his Fifth Amendment right to due process of law in deportation proceedings. It is submitted that such a contention erroneously described the procedures involved

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*Nikprelevic apparently attempts to distinguish these cases by reliance upon the double jeopardy clause of the Fifth Amendment. It is respectfully submitted that the Fifth Amendment does not prevent his deportation because the double jeopardy clause is inapplicable to deportation proceedings. See Oliver v. U.S. Dept. of Justice, 517 F.2d 426, 428 (2d Cir. 1975); Bridges v. Wixon, 144 F.2d 927 (C.C.A. Cal.) reversed on other grounds, 326 U.S. 135 (1945).

in deportation hearings relating to an application under Section 243(h) of the Act. This petitioner first made an application for political asylum with the District Director for the Service. Under established procedures, if the District Director does not approve the claim, he forwards it to the Office of Refugee and Migration Affairs, Department of State, for an expression of its views. Rather than being an administrative "denial" of his application for political asylum the letter from the Department of State is merely advisory in nature and is not binding upon the Service. After studying the case, the Director of the Office of Refugee and Migration Affairs was of the opinion that petitioner did not have a valid persecution claim and the District Director, concurring, denied the application. The refusal of the District Director to grant an application for asylum did not deprive the alien of again applying for withholding of deportation pursuant to Section 243(h) of the Act at a deportation hearing.

Subsequently, petitioner applied for withholding of deportation and his persecution claim was considered de novo by the Immigration Judge. Furthermore, the information contained in the District Director's request to the Department of State was received from the petitioner as a result of an interview on his application wherein he could have submitted any and all information which might have been favorable to his application.

With respect to the introduction of that advisory opinion at the deportation hearing wherein his claim was considered de novo, it is submitted that the letter "came from a knowledgeable and competent source and was admissible at the hearing". Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1969). See also 8 C.F.R. §242.14(c). Such letters have been held admissible. Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1969); Sheng v. Immigration and Naturalization Service, 400 F.2d 678 (9th Cir. 1968), cert. denied, 393 U.S. 1054 (1969); c.f. Namkung v. Boyd, 226 F.2d 385

(9th Cir. 1955), even though their quality may have been questioned. Hosseinmardi, supra. The letter was certainly of probative value and admissible.

The Immigration Judge made his decision based on the totality of the evidence, including the petitioner's testimony. He enjoyed the advantage of seeing and hearing the petitioner, and was in the best position to determine the accuracy, reliability and truthfulness of the petitioner's testimony; and his evaluation thereof is entitled to great weight.

The deportation hearing complied with all the requirements of a fair hearing. Sung v. McGrath, 339 U.S. 33 (1950). The petitioner was represented by counsel. He was given the opportunity to be heard and to introduce evidence and witnesses on his behalf. 8 C.F.R. §242.16. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be allowed to stand. If the petitioner's persecution claim was rejected twice, once by the District Director and once

by the Immigration Judge, it was not because the Government denied him due process, but rather because the claim is frivolous.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 75-4122

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

24th day of February, 19 76 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Charles A. Giulini, Jr. Esq.,
310 Madison Ave.
NY NY

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

24th day of February, 19 76

Ralph L Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977